No. 133

FILED
JUN 8 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955

REUBEN D. SILLIMAN, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of Facts	4
Reasons for Granting the Writ:	
I. The Handling of this Case by the Courts Below, Involving a Vital Point of Federal Tax Administration, was so Lacking in Fair and Judicial Procedure and Consideration as to Require the Exercise of the Supervisory Function of this Court, not only to Correct the Injustice Wrought in this Case but to Prevent the Recurrence of Like Injustice in similar Cases Arising in the Future	8
II. The Decision of the Courts Below is in Conflict with Decision of this Court in the Bogardus Case	12
III. The Determination of the Lower Courts That the Petitioner was Guilty of Fraud was Clearly Erroneous, Having No Support in the Primary and Evidentiary Facts and Should be Overturned in Accordance with the Applicable Decisions of this Court	14
Conclusion	18
Appendix	1a

TABLE OF CITATIONS

CASES:

Abernethy v. Commissioner, 211 F. 2d 651, rev'g. 20 T.C. 593	14
William C. Barnes, 17 B.T.A. 1002	14
Blair v. Rosseter, 33 F. 2d 286	14
Bogardus v. Commissioner, 302 U.S. 34	2, 12, 13, 14, 15
Herman T. Dietrick, 6 B.T.A. 1371	14

Page

Dobson v. Commissioner, 320 U.S. 489 11
Gould v. Gould, 245 U.S. 151 18
Earl S. Gwin, 14 B.T.A. 393 14
Ruth Hahn, 13 T.C.M. 308 14
Hershman v. Kavanaugh, 210 F. 2d 654 14
Lunsford v. Commissioner, 62 F. 2d 740 14
Alice M. MacFarlane, 19 T.C. 9 14
Est. of Grace G. McAdow, 12 T.C. 311 14
Mutch v. Commissioner, 209 F. 2d 390, rev'g. 12 T.C.M. 705 14
Bert B. Newton, 11 T.C. 512 14
Schall v. Commissioner, 174 F. 2d 893, rev'g. 11 T.C. 111 14
Alexander B. Siegel, 39 B.T.A. 60 14
Spies v. United States, 317 U.S. 492 15
E. B. Tousek, 1 B.T.A. 1164 14
Tucker v. Moreland, 10 Pet. 58 15
United States v. Merriam, 263 U.S. 179 14
Dupuy G. Warrick, 44 B.T.A. 1068 14

STATUTES:

Internal Revenue Code of 1939:
Section 1112 2

Revenue Act of 1924:
Section 213(a) 2
Section 213(b)(3) 3
Section 275 3

Revenue Act of 1926:
Section 213(a) 2
Section 213(b)(3) 3
Section 275 3

Trading with the Enemy Act, 40 Stat. 425, 50 U.S.C. Appendix, § 16 3
Winslow Act, 42 Stat. 1515, 50 U.S.C. App. Section 20 .....3, 4, 5, 12, 13, 14, 15, 17

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Reuben D. Silliman, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit in the above case.

OPINIONS BELOW

The opinions of the Tax Court of the United States are unreported. (R. 65-79; 95-96). The opinion of the United States Court of Appeals for the Second Circuit (R. 105) is reported in 220 F. 2d 282 (1955).

JURISDICTION

The decision of the United States Court of Appeals was entered on March 10, 1955. (R. 106). The jurisdiction of

this Court is invoked under 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the handling of this case by the courts below was so lacking in fair and judicial procedure as to require the exercise of the supervisory function of this Court.

2. Whether the courts below misapplied the rule of this Court respecting payments made as gifts in appreciation of services as laid down in *Bogardus* v. *Commissioner*, 302 U.S. 34.

3. Whether the determination of the lower courts that the petitioner was guilty of fraud was clearly erroneous without support in the primary and evidentiary facts.

STATUTES INVOLVED

Internal Revenue Code:

> "Section 1112. Burden of Proof in Fraud Cases.
>
> "In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner."

Revenue Act of 1924; Revenue Act of 1926:*

> "Section 213.
>
> • • •
>
> "(a) The term 'gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions . . . The amount of all such items shall be included in the gross income for the taxable years in which received by the taxpayer . . .

* The quoted sections are identical in both Revenue Acts.

"(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title:

* * *

"(3) The value of property acquired by gift . . ."

"Section 275.

* * *

"(b) If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended."

Trading with the Enemy Act (Winslow Act), 42 Stat. 1515, 50 U.S.C. Appendix:

"Section 20. Fees of agents, attorneys, or representatives. No money or other property shall be paid, conveyed, transferred, assigned, or delivered under this Act to any agent, attorney at law or in fact, or representative of any person entitled thereto, unless satisfactory evidence is furnished the President or the court, as the case may be, that the fee of such agent, attorney at law or in fact, or representative for services in connection therewith does not exceed 3 per centum of the value of such money or other property; but nothing in this section shall be construed as fixing such fees at 3 per centum of the value of such money or other property, such 3 per centum being fixed only as the maximum fee that may be allowed or accepted for such services. Any person accepting any fee in excess of such 3 per centum shall, upon conviction thereof, be punished as provided in section 16 hereof." (Oct. 6, 1917, c. 106, § 20, added, March 4, 1923, c. 285, § 2, 42 Stat. 1515; March 10, 1928, c. 167, § 9(c), 45 Stat. 267.)

STATEMENT OF FACTS

The petitioner is 84 years of age and has been a practicing attorney in Minnesota, Hawaii, California, and New York from 1893 to the present time. In 1900 he was appointed a judge of the Republic of Hawaii, and when Hawaii became a Territory of the United States he was appointed judge by President McKinley. (R. 44).

In the year 1924, the petitioner was retained by a close friend and long-time client, John F. Hackfeld, to secure the return to Mr. Hackfeld of property which had been seized in World War I by the Alien Property Custodian. The petitioner had no written contract for compensation by Mr. Hackfeld. (R. 23). The Winslow Act (42 Stat. 1515, 50 U.S.C. Appendix) then in force limited attorneys' fees in such cases to 3 per cent of recovery. Mr. Hackfeld told the petitioner, however, that he wished to pay an additional 10 per cent if that could legally be done. (R. 23-24; 49-50).

In the year 1924, by Executive Order of President Coolidge, property of the value of $3,413,389.05 was returned to Mr. Hackfeld by the Alien Property Custodian. (R. 6; 33-34). Before the return of the property, Mr. Hackfeld and the petitioner discussed the matter of permissible fees under the Winslow Act with Mr. Harwood, Assistant Comptroller of the Alien Property Custodian's Office, and Mr. Bishop, the representative of the Bureau of Internal Revenue in the Alien Property Custodian's Office. The advice of these officials was that while the maximum fee in these matters was limited to 3 per cent of the amount recovered, Mr. Hackfeld could, without violation of the law, make a voluntary gift of any amount he pleased. The petitioner and Mr. Hackfeld were also told that other persons had handled such matters in this way. (R. 31-34). Accordingly, Mr. Hackfeld paid the petitioner the maximum legal fee of 3 per cent, and also voluntarily gave him an additional 10 per cent of the value of the recovery. (R. 24; 27-28; 51). The petitioner did

not report the 10 per cent as income because this amount was considered to be a gift. (R. 28; 34). All monies received from Mr. Hackfeld in 1924, including the 3 per cent and the 10 per cent gift, were deposited in the petitioner's ordinary checking accounts without any concealment of, or thought of concealing, the receipt of the funds or their source. (R. 6-7).

In 1924, the petitioner entered into a similar arrangement with Mr. Hackfeld's business associate, Mrs. Beta Isenberg, who was familiar with the Hackfeld case and asked the petitioner to represent her on a similar basis. Mrs. Isenberg also understood the limitations of the Winslow Act and recognized that only 3 per cent could be received as a fee and that any amount paid in excess thereof would constitute a voluntary gift. (R. 39-40; 62-63).

In 1926, the petitioner succeeded in recovering the property of Mrs. Isenberg from the Alien Property Custodian by court decree. (R. 7; 44). In the same year the petitioner received amounts from Mrs. Isenberg, aggregating 10 per cent of the recovery of her property. (R. 7-8). The petitioner again discussed the treatment of these amounts with Mr. Harwood and Mr. Bishop and was advised, as in the Hackfeld instance, that the aggregate amounts were legally acceptable under the Winslow Act and that the 3 per cent fee allowed under the Winslow Act was taxable, and the remaining 7 per cent gratuity should be treated as a gift and excluded from gross income. (R. 40; 42-43).

During the year 1927, the petitioner secured the recovery of additional properties of Mr. Hackfeld and Mrs. Isenberg. (R. 7-8). Following the practice of the prior years, petitioner returned only the 3 per cent fees as taxable income. All the amounts received by the petitioner from Mr. Hackfeld and Mrs. Isenberg during 1926 and 1927 were deposited in his usual bank accounts. (R. 8-11).

The petitioner's returns for the years 1924, 1926 and 1927 were promptly audited and cleared by the Bureau of

Internal Revenue after an examination of petitioner's records, including his bank statements and checkbooks. (R. 71). In view of the large number of security transactions shown on the face of the petitioner's returns for those years and the large volume of bank deposits, it would have been virtually impossible for a revenue agent not to have known that the petitioner had been the recipient of funds in excess of those included in gross income. (R. 70-71; 99-104).

In 1950, nearly one-quarter of a century later, the respondent determined a deficiency against the petitioner for 1924, 1926 and 1927 on the ground that all amounts reecived by him from Mr. Hackfeld and Mrs. Isenberg were includible in gross income and that his failure to report sums received in excess of 3 per cent was due to fraud with intent to evade tax. (R. 1).

The petitioner challenged this determination in a petition to the Tax Court. (R. 1). Under the procedure set up by the Chief Judge of the Tax Court, this case was heard, not by the court, but by a single judge thereof. (R. 2). On September 5, 1952, the single judge entered a Memorandum Findings of Fact and Opinion in favor of the respondent. The petitioner made a motion for review by the full Tax Court, which was denied. (R. 65-79). On October 30, 1953, a decision was entered finding deficiencies and penalties which with interest at 6 per cent for almost 30 years total nearly $900,000. (R. 96-97).

During the hearing the petitioner offered, in addition to his own testimony, the testimony of Sherwood Silliman, his son, for the purpose of corroborating his own testimony concerning the state of his mind with respect to the issues in the case. The court excluded this testimony. (R. 58-61). The petitioner duly filed a motion for rehearing and reconsideration on the ground that the court had erred in excluding Sherwood Silliman's testimony. (R. 79-88). Petitioner's motion was granted and a further hearing, restricted to this testimony, was held on January 13, 1953.

(R. 88-95). Sherwood Silliman's testimony corroborated that of petitioner on numerous vital points. (R. 88-95). On June 22, 1953, the Tax Court entered its supplemental memorandum opinion, containing no discussion of the supplemental testimony and re-affirming its original opinion. (R. 95-96).

Like his father, the petitioner's son, Sherwood Silliman, is a prominent and reputable attorney. During the years in issue he was first a student at Yale Law School, from which he graduated in 1925, and then a practicing attorney. From 1927 to 1936, he was with the firm of Chadbourne, Stanchfield and Levy, as an associate and later as a partner. From 1936 to 1940, he was assistant to a vice-president of the American Tobacco Company. He returned to law practice in 1940, in partnership with his father in the firm of Silliman, Gay & Silliman. In 1943, he went to the Vick Chemical Company as Assistant General Counsel, becoming General Counsel in 1946 and Secretary in 1951. He is admitted to practice before the Supreme Court of the United States, the Court of Appeals for the Third Circuit and for the District of Columbia and various administrative tribunals. He has served as a Trustee of the Village of Scarsdale, New York, where he resides.

A petition for review was filed with the United States Court of Appeals for the Second Circuit and that court affirmed *per curiam* on the opinion of the Tax Court. (R. 4; 104).

REASONS FOR GRANTING THE WRIT

I. The Handling of This Case by the Courts Below, Involving a Vital Point of Federal Tax Administration, Was So Lacking in Fair and Judicial Procedure and Consideration as to Require the Exercise of the Supervisory Function of This Court, Not Only to Correct the Injustice Wrought in This Case But to Prevent the Recurrence of Like Injustice in Similar Cases Arising in the Future.

The inadequacy of the judicial consideration given to this case by the courts below can be more fully appreciated when considered in the light of the extraordinary circumstances involved, including the following:

(1) The case was initiated by the government more than 26 years after the first of the taxable years in issue.

(2) The income tax statute of limitations had long since expired.

(3) At the time of the trial the petitioner was 82 years of age.

(4) Virtually all of the people who could have corroborated petitioner's testimony had died and most of his records were no longer in existence.

(5) The accumulation of interest for over 30 years has converted a basic deficiency of $195,855, plus penalties of $97,927, into a total of approximately $900,000.

(6) The petitioner is an attorney and a member in good standing of the bars of Minnesota, Hawaii, New York and California, as well as one of the senior members of the Bar of this Court; and the trial counsel for the respondent at no time challenged or impugned his reputation for truth and veracity.

(7) The Tax Court specifically found that the petitioner's returns were subjected to normal and routine audit by Internal Revenue Agents and were approved

without change more than 20 years before the trial of the case.

(8) The respondent had the statutory burden of proof on the issue of fraud—a burden that can only be carried by "clear and convincing proof." Nevertheless, he introduced no proof in support of his charge of fraud other than the fact itself that the receipts in excess of 3 per cent were excluded from gross income.

In view of these circumstances, one would think that the trial court would have demanded the most exacting and specific proof of fraud. But, to the contrary, the Tax Court was willing to merely assume that the petitioner "knew" the amounts in question were income and, solely on the basis of this surmise, found fraud. (See III, *infra*.)

One would have thought that in view of all the circumstances, not only the Chief Judge of the Tax Court, but the judge who tried the case, would have favored review by the full court. On the contrary, the petitioner's motion for such a review was denied.

One would have thought, in view of the terrific risk presented for a possible miscarriage of justice, that the appellate court would have most thoroughly scrutinized the lower court's handling and disposition of the case. But, on the contrary, the Second Circuit, on argument (which we have to rely upon since its decision was *per curiam*), made it plain that they would exercise no function of review. As Presiding Judge Frank put it, the court could not be expected to review the case "without a motion picture of the proceedings below" since a question of fact was involved.

Thus, in effect, the Second Circuit held that as a practical matter, there is no appeal from a one-man Tax Court decision in a case involving an issue of fraud—which is always factual. The extent to which the court's mind was closed to a review of the case is evidenced by the fact that petitioner's counsel was not even permitted to reply to respondent's argument which was based solely on the

premise that the lower court had heard the witnesses and its finding was unreviewable. The Second Circuit affirmed *per curiam* in one sentence, adopting the opinion of the single judge of the Tax Court without dealing with a single one of the many substantial contentions advanced by the petitioner in his brief.

Thus, the petitioner arrives at the door of this Court without a review by the Tax Court, without a review (except in form) by the Second Circuit, and without the opportunity for a trial by jury.

The Seventh Amendment of the Constitution guarantees to each citizen the right to a trial by jury in a civil action involving more than twenty dollars. In establishing the Tax Court, Congress set up an alternative procedure where tax cases could be litigated without requiring the payment of the amount in question. Where the respondent delays for more than 26 years in bringing his action and then increases the asserted tax by a 50 per cent penalty plus 26 or more years of interest at 6 per cent, many taxpayers, like this petitioner, do not have the money to pay the assessment and obtain his jury trial. Thus, the only forum available is the Tax Court where a trial by jury is not accorded.

In setting up the Tax Court, Congress created a court of sixteen members to be divided by the presiding judge into divisions of one or more judges to hear the case. As a matter of practice, the Tax Court has refused to accord taxpayers a hearing by more than one judge. In the instant case the petitioner duly moved for a review of the sitting judge's opinion by the full court, which motion was denied. Since the Second Circuit has already brushed the case aside *per curiam*, the only remedy left to the petitioner is this petition for certiorari.

Petitioner fully recognizes that this Court will not consider cases involving the proper weight to be given to conflicting evidence, but this is not that kind of case. Among other things, it presents the question as to the amount of judicial protection the taxpayer should be en-

titled to in the lower courts when confronted with liabilities and civil fraud charges as serious as those involved in the instant case where, by reason of the extraordinary circumstances enumerated above, the risk of doing the accused an injustice is so great.

The extraordinary characteristics of this case were obvious on its face. A 26 year old fraud charge and a claim for almost $900,000, was being asserted against an elderly taxpayer who was left to defend himself without the help of important corroborating witnesses who had died in the meantime; without the aid of important records long since discarded; and handicapped by the frailty of memory that results, not just from age, but also from lapse of time. It is respectfully submitted that the situation called for the maximum, not the minimum, protection of the petitioner's rights by the lower courts within the authority granted to them under the law.

With full statutory authority to do so, the Chief Judge of the Tax Court could have assigned more than one judge as a division to hear the case in the first instance. After a decision reached thereby, either the Chief Judge or any other member of the court could have called for a review by the full court. In view of the statutory reversal of the doctrine of *Dobson* v. *Com'r.*, 320 U.S. 489, the Second Circuit had full authority to examine into the Tax Court's decision, with or without the help of "motion pictures", to determine whether as a matter of law there was sufficient evidence to support the determination of Judge Arundell.

In spite of the availability of the foregoing procedures, the present fraud judgment, now amounting to nearly a million dollars, represents in reality nothing but the opinion of a single member of the Tax Court. He sat alone, not with any associates; he virtually assumed that there was fraudulent intent and thus lifted a 3 year statute of limitations to permit the government to go back 26 years to make a tax collection; a review by the full court was denied; and the Circuit Court refused to give consideration

to the case on the ground that a factual issue was involved. We submit that in the light of the legal procedures available, those followed in this case were wholly inadequate to assure the petitioner a fair determination of his tax responsibilities.

We, therefore, for this first reason, most earnestly urge upon this Court that it exercise its supervisory functions over the lower courts and grant this petition for a writ of certiorari in order that consideration can be given as to the degree and quality of judicial review a taxpayer should be afforded when confronted with a *fraud* charge and a staggering ancient claim for a tax deficiency, the bulk of which results from a pile-up of interest charges.

II. The Decision of the Courts Below is in Conflict With Decision of This Court in the Bogardus Case.

In holding that the sums received by the petitioner in excess of the 3 per cent permitted by the Winslow Act were taxable income to the petitioner, we submit that the courts below are in direct conflict with the decision of this Court in *Bogardus* v. *Commissioner,* 302 U.S. 34.

In the *Bogardus* case, a new corporation which had acquired all of the assets of another corporation made payments to the former employees of the old corporation in appreciation of the loyalty and support of those employees. It was clear that the payments were motivated solely by the services rendered by the employees to the old corporation. The stockholders of the old corporation were the stockholders of the new in the same proportions and were desirous of expressing their gratitude through payments from the new corporation. The very resolutions that authorized the payments described them as a "bonus * * * in recognition of the valuable and loyal services" of the employees. Nevertheless, this Court held, in considering the tax status of the employees, that "a gift is nonetheless a gift because inspired by gratitude for the past faithful service of the recipient." It held that the

crucial factor in this type of case is what the parties intended—and the intention was, clearly, that the payment should be a gift. This Court stressed not only the absence of any legal duty to make the payment but the absence of the "incentive of anticipated benefit of any kind" as evidence of this intent.

There is present in this case all of the elements of a gift that were present in the *Bogardus* case:

(1) The payments were made without compulsion and in the absence of a binding obligation.

(2) They were made in grateful recognition of past services.

(3) The payor lacked the incentive of any future benefit from the payment.

(4) They were made out of a sense of gratitude and arose out of a close personal relationship between the payor and the petitioner and intended by the parties to be gifts.

When one adds to these elements the fact that the payments would actually have been illegal if paid as a fee (a factor not present in the *Bogardus* case), the applicability of the *Bogardus* case becomes even clearer. (See Winslow Act, 42 Stat. 1515.)

The attempt by the Tax Court Judge to distinguish the *Bogardus* case is utterly inadequate. He found that the payments in that case were prompted "by reason of the great good fortune that had inured to the stockholders as the result of their participation in the old company." In the instant case also, the payments were prompted by the great good fortune of the payors, and there was a clear intention to make gifts to the petitioner, as any other course would have violated the law. Both Mr. Hackfeld and Mrs. Isenberg were well aware, as the record shows, that they were under absolutely no obligation to pay the

petitioner more than the 3 percent allowed by the Winslow Act.

We submit that placing these two cases side by side compels the conclusion that they are, for all practical purposes, indistinguishable on this point and the rule of the *Bogardus* case is, of course, controlling. To hold that petitioner was in receipt of taxable income was error. To hold that his treatment of the payments in question as non-taxable was fraudulent is incredible. See also, *United States* v. *Merriam*, 263 U.S. 179 (1923); *Blair* v. *Rosseter*, 33 F. 2d 286 (9th Cir. 1929); *Lunsford* v. *Commissioner*, 62 F. 2d 740 (6th Cir. 1933); *Schall* v. *Commissioner*, 174 F. 2d 893 (5th Cir. 1949), rev'g 11 T.C. 111 (1948); *Mutch* v. *Commissioner*, 209 F. 2d 390 (3rd Cir. 1953), rev'g 12 T.C.M. 705 (1953); *Abernethy* v. *Commissioner*, 211 F. 2d 651 (D.C. Cir. 1954), rev'g 20 T.C. 593 (1953); *Hershman* v. *Kavanaugh*, 210 F. 2d 654 (6th Cir. 1954); *E. B. Tousek*, 1 B.T.A. 1164 (1926); *Herman T. Dietrick*, 6 B.T.A. 1371 (1927); *Earl S. Gwin*, 14 B.T.A. 393 (1928); *William C. Barnes*, 17 B.T.A. 1002 (1929); *Alexander B. Siegel*, 39 B.T.A. 60 (1939); *Dupuy G. Warrick*, 44 B.T.A. 1068 (1941); *Bert P. Newton*, 11 T.C. 512 (1948); *Estate of Grace G. McAdow*, 12 T.C. 311 (1949); *Alice M. MacFarlane*, 19 T.C. 9 (1952); *Ruth Hahn*, 13 T.C.M. 308 (1954).

We, therefore, most earnestly urge, for this second reason, that this Court grant this petition in order to prevent a misapplication of the rule of this Court laid down in *Bogardus* v. *Commissioner, supra.*

III. The Determination of the Lower Courts That the Petitioner Was Guilty of Fraud Was Clearly Erroneous, Having No Support in the Primary and Evidentiary Facts and Should be Over-turned in Accordance With the Applicable Decisions of This Court.

There is no evidence to support the lower court's determination of fraud and it is clearly erroneous. As this Court long ago declared, fraud will never be imputed in any

situation unless the circumstances are "not fairly susceptible of any other interpretation." *Tucker* v. *Moreland*, 10 Pet. 58, 78.

The entire evidence in this case points to an honest belief of the petitioner, in the light of the Federal income tax law in the 1920's when he prepared and filed his returns, that he was proceeding exactly in accordance with the law of gifts and the tax law.

The lower court's determination primarily rests on one fact which was never in dispute—that the petitioner received and did not report as income the amounts received in excess of the 3 per cent permitted by the Winslow Act.

In light of the *Bogardus* case and similar cases discussed above, it is inconceivable that the mere omission of the amounts in question—the real basis of the Tax Court's decision—would constitute sufficient proof of fraud.

The simple issue as to fraud was whether or not the petitioner actually believed, rightly or wrongly, as he testified, that the payments in excess of 3 per cent, which he received, had the legal status of gifts. The crucial element is scienter or the intent to evade. The responsibility to come forward with *proof* of such fraudulent intent is not satisfied by a mere naked surmise by the Tax Court Judge as to what the taxpayer thought or by an assertion as to what he should have thought. (R. 77). There must be a positive, affirmative proof that the taxpayer filed a fraudulent return and knew it to be false when he filed it. There is no such proof. The respondent introduced no evidence and referred to none in his brief in the courts below. He relied solely on the improbability that the petitioner could really have believed that the amounts in question were not income. That is mere assumption and surmise.

This Court said in *Spies* v. *U.S.*, 317 U.S. 492, 496:

> "It is not the purpose of the law to penalize frank differences of opinion or innocent errors made despite the exercise of reasonable care."

The petitioner testified, in answer to questions of the counsel for the respondent, that he knew of the Winslow Act limitations on fees; that his clients also knew of them; that if a way to do so could legally be found he desired to receive in excess of 3 per cent of the recovery; that his clients were of the same mind; that he discussed the matter with the office of the Alien Property Custodian as to what might be done and was informed that a purely voluntary payment in excess of 3 per cent would be a gift for Winslow Act purposes; that he received the payments as amounts voluntarily paid by clients *who could not in fact have been compelled to make such payments;* that in view of his conversations with the Custodian's office, he classified the amounts as gifts and that he concluded that the amounts were non-taxable since gifts were non-taxable.

It is interesting to note that the original opinion rejected this testimony as without corroboration. However, as previously noted, the petitioner had offered the testimony of his son, Sherwood Silliman, for the purpose of corroborating the petitioner's testimony concerning his state of mind with respect to the character of the sums in issue. The judge had excluded this testimony. The Court, however, granted petitioner's motion for a rehearing and reconsideration for the purpose of taking Sherwood Silliman's testimony. This testimony corroborated that of the petitioner in many essential aspects. Nevertheless, the judge entered a supplemental memorandum opinion reaffirming the decision without even discussing the forceful and persuasive testimony that had been added to the record.

The respondent would make much of the fact that the petitioner was an experienced lawyer and was unlikely to have thought that the amounts were non-taxable. Actually, bearing in mind that the petitioner was not a tax specialist, it is just such a person who, in the circumstances, would be conscious of the difference in legal status between a gift and taxable income and who could honestly conclude that the intention to clothe the payment as a

gratuity would be sufficient to remove it from the category of taxable income. Such reasoning is far more plausible because of the legal training of the petitioner than would be the case without such training. It was *as a lawyer* that he knew that the contemplated payments could not be made as obligatory fees and could only be made on a purely voluntary basis. To establish a standard even remotely resembling infallibility for tax matters for attorneys would rapidly decimate the membership of the Bar.

The opinion below is clearly erroneous in the implicit *assumption* (an assumption apparently viewed by the lower courts as the equivalent to clear and convincing proof) that the petitioner's view of the tax law in 1924 was so unreasonable that it could not honestly have been his opinion. (R. 77). As a matter of fact, as is well known to this Court, the distinction between compensatory payments and non-taxable gifts is a thin one and has been a constant source of litigation since the introduction of the Federal income tax.

The contemporaneous cases are significant not only for the propositions of law or analyses of facts they set forth, but for the light they throw on a bygone approach to tax issues. In those days the doctrine was prevalent that the tax statutes were, in case of doubt, to be construed strongly against the government and in favor of the citizen. See *Gould* v. *Gould,* 245 U.S. 151 (1917). The analysis of transactions under the revenue laws was basically formalistic, and the notion that courts might "look through" the ritual of transactions and over-turn traditional legal characterizations imposed on transactions, was unheard of.

In the climate of the 1920's, at least, there was nothing strange about the notion that a gift from the standpoint of the Alien Property laws would also be a gift for tax purposes. But no account was taken of this important fact in the Tax Court Judge's opinion. The opinion reads as if the transactions in question were entered into in the light of present-day circumstances. We realize the

difficulty of viewing any transaction in the framework of 26 years ago.

President Eisenhower, in one of his recent statements to the press (March 23, 1955) respecting the Yalta concessions to Russia, expressed the difficulty of viewing transactions in the light of after events. He said—

> "There is nothing, as I can see, to be gained by going back ten years and showing that, in the light of after events, someone may have been wrong, or someone may have been right."

Whether the petitioner, in viewing the transaction in the tax atmosphere of the 1920's, was wrong or right is not the point. There is no clear and convincing evidence to support a determination that petitioner's returns were false and fraudulent with intent to evade tax. The opinion of the Tax Court Judge is clearly erroneous and the Court of Appeals should have reversed such determination.

CONCLUSION

In summary, therefore, we most earnestly urge that the petition for writ of certiorari be granted for the following three reasons:

(1) The handling of this case by the courts below requires the exercise of the supervisory function of this Court.

(2) The decision of the courts below conflicts with the controlling decision of this Court.

(3) The determination of the lower courts that the petitioner was guilty of fraud was clearly erroneous, without any support in the evidence.

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APPENDIX

APPENDIX

Judgment

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 63

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of March one thousand nine hundred and fifty-five.

Present:

HON. JEROME N. FRANK,
HON. HAROLD R. MEDINA,
Circuit Judges,
HON. STEPHEN W. BRENNAN,
District Judge.

REUBEN D. SILLIMAN, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed on the opinion of Judge Arundell, 11 T.C.M. 921 and 12 T.C.M. 707.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

/s/ A. DANIEL FUSARO
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 63 October Term, 1954.

Argued February 16, 1955 Decided March 10, 1955.

Docket No. 23001.

REUBEN D. SILLIMAN, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Before: FRANK and MEDINA, Circuit Judges, and BRENNAN, District Judge.

On petition to review the decision of the Tax Court of the United States, holding that certain sums, paid to the petitioner, an attorney, by clients, were compensation for services, and that his failure to report these sums as income was fraudulent and with intent to evade tax. AFFIRMED.

ALGER B. CHAPMAN, JOSEPH J. O'CONNELL, JR. and BRADY O. BRYSON, for petitioner
(WALTER J. ROCKLER, of counsel)
H. BRIAN HOLLAND, ELLIS N. SLACK and DAVID O. WALTER, for respondent

PER CURIAM: Affirmed on the opinion of Judge Arundell, reported in 11 T.C.M. 921, and supplemental opinion, reported in 12 T.C.M. 707.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	9

CITATIONS

Cases:

Bogardus v. *Commissioner*, 302 U. S. 34	7
Helvering v. *Stuart*, 317 U. S. 154	9
Rodiek v. *United States*, 100 C. Cls. 267	8
United States v. *Merriam*, 263 U. S. 179	8
United States v. *Rodiek*, 117 F. 2d 588, affirmed, 315 U. S. 783	8

Statutes:

Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 213	2
Sec. 223	3
Sec. 275	3
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 213	3
Sec. 223	3
Sec. 275	3
Trading with the Enemy Act, c. 106, 40 Stat. 411, Sec. 20 (50 U. S. C. Appendix 1940 ed., Sec. 20)	3

Miscellaneous:

Black, *A Treatise on Federal Taxes* (4th ed., 1919), p. 57	8
Holmes, *Federal Income Tax* (3d ed., 1920), p. 239	9
Montgomery, *Income Tax Procedure* (8th ed., 1924), pp. 461-462	9
Rule 23(a), Rules of U.S. Court of Appeals for the Second Circuit	7

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 133

REUBEN D. SILLIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Tax Court of the United States (R. 65-79, 95-96) are unreported. The opinion of the Court of Appeals (Pet. App. 2a) is reported at 220 F. 2d 282.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1955. (Pet. App. 1a.) The petition for a writ of certiorari was filed on June 8, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the courts below erred in determining that amounts paid to taxpayer, an attorney, by his clients in the years 1924, 1926 and 1927, were compensation for services rendered and were taxable income.

2. Whether the courts below erred in determining that taxpayer's failure to report these sums as income on his returns for those years was fraudulent and with intent to evade tax.

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 213. For the purposes of this title, except as otherwise provided in section 233—
>
> (a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, * * *
>
> (b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:
>
> * * * * *
>
> (3) The value of property acquired by gift, bequest, devise, or descent * * *
>
> * * * * *

SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

* * * * *

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

* * * * *

SEC. 275. * * *

(b) If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Sections 213, 223, and 275 of the Revenue Act of 1926, c. 27, 44 Stat. 9, contain identical words.

Trading with the Enemy Act, c. 106, 40 Stat. 411:

SEC. 20 [As added by Sec. 2, Act of March 4, 1923, c. 285, 42 Stat. 1511]. That no money or other property shall be paid, conveyed, transferred, assigned, or delivered under this Act to any agent, attorney, or representative of any person entitled thereto, unless satisfac-

tory evidence is furnished the President or the court, as the case may be, that the fee of such agent, attorney, or representative for services in connection therewith does not exceed 3 per centum of the value of such money or other property, but nothing in this section shall be construed as fixing such fees at 3 per centum of the value of such money or other property, such 3 per centum being fixed only as the maximum fee that may be allowed or accepted for such services. Any person accepting any fee in excess of such 3 per centum shall, upon conviction thereof, be punished as provided in section 16 hereof.

(50 U.S.C. Appendix 1940 ed., Sec. 20.)

STATEMENT

Taxpayer is an attorney who in 1924 was employed by John F. Hackfeld and Mrs. Beta Isenberg to obtain the return of property vested by the World War I Alien Property Custodian, totalling in value nearly $7,000,000. He was successful in securing a return of the property. (R. 67-70.)

Section 20 of the Trading with the Enemy Act, as it then read (quoted above), limited the fees of agents, attorneys or representatives of claimants to three per cent of the value of the property returned. Taxpayer and his client Hackfeld were aware of this provision. (R. 67.) Taxpayer was not satisfied with this amount, and entered into an oral agreement with Hackfeld for the payment of a minimum of three per cent and a total of thirteen per cent, unless there was no way to avoid the three

per cent limitation. (R. 50, 67.) This agreement was made prior to taxpayer's performing any services in connection with the claim. (R. 50, 67.)

Subsequently, in October 1924, taxpayer entered into an agreement to represent Beta Isenberg in her proceedings against the Custodian. A written agreement was prepared by taxpayer (R. 16, 67-68) and signed by taxpayer and by Beta Isenberg's attorney-in-fact, Alex W. Sielcken (R. 67). This agreement provided for a fee of ten per cent (R. 14-15), but taxpayer testified that of that amount three per cent was 'the basic legal fee" and the additional amount was "a gratuity" (R. 40).

Partial returns of the property to the claimants were made at various dates in 1924, 1926 and 1927. (R. 5-12, 68-70.) Taxpayer received his fee simultaneously with, or a few days after, issuance of Government checks in payment of his clients' claims. All of the amounts paid to, or retained by, taxpayer exceeded three per cent of the recovery involved. (R. 73-74.)

The payments, to the extent that they exceeded the three per cent limitation, were not reported on taxpayer's income tax returns. (R. 76.) The Tax Court found that taxpayer understated his income from his profession for the years 1924, 1926, and 1927 by the amounts of $345,822.85, $191,168.07, and $16,900.82, respectively, and that the returns were false and fraudulent with intent to evade tax, and the deficiencies due to fraud with intent to evade tax. (R. 71.) The Court of Appeals affirmed, *per curiam,* on the opinions of the Tax Court.

ARGUMENT

1. Taxpayer requests this Court to exercise its supervisory power to correct asserted injustice, charging that the handling of this case by the courts below was lacking in fair and judicial procedure and consideration.

Stripped of hyperbole his specific complaints of inadequate procedure are few and frivolous. He criticizes the proceedings in the Court of Appeals on the following grounds: Judge Frank used graphic language in pointing out that an appellate court does not have the same opportunity as a trial court to observe the demeanor of witnesses and thereby evaluate their credibility; after the issues had been developed in the opening argument for taxpayer and the Commissioner's answering argument, the court did not think further oral argument was necessary; after considering the case and reaching its decision, the court did not write a detailed opinion reviewing all the contentions, but adopted the opinions of Judge Arundell of the Tax Court.

His complaints against the procedure in the Tax Court are two: Prior to the hearing, Chief Judge Kern did not regard the case as important or difficult enough to call for the admittedly unusual procedure of assigning more than one judge to hear the case; after the hearing, neither Judge Arundell nor Chief Judge Kern, nor any other member of the court, regarded the case as one presenting problems requiring review by the full court.

Supervision of oral argument before it is, of course, a matter within the discretion of the Court

of Appeals.[1] Obviously, the same is true of the Court of Appeals' determination that it should affirm on the thorough opinions of the Tax Court rather than write a detailed opinion of its own.

The Clerk of the Tax Court advises that the procedure which taxpayer urges, *i. e.*, trial before several judges of that court, is so extraordinary that there has been no trial conducted by a panel of judges for at least ten years. Moreover, no circumstances were present which indicated the propriety, no less the necessity, of review *en banc* by the Tax Court.

2. As to the question whether the payments were "income," there is no conflict with the decision of this Court in *Bogardus* v. *Commissioner,* 302 U. S. 34. That case involved an honorarium authorized by the stockholders of a corporation and paid to the former employee of a predecessor corporation in recognition of services long since performed. There was no element of agreement as between the donor and the recipient (who, indeed, was never in the donor's employ).

Here the payments were the result of negotiations and made pursuant to an agreement entered into prior to the rendition of services; they related solely to the contemplated services, were conditioned upon and measured by the successful performance of professional services, and were made currently as each claim was allowed.

Nor does the decision below conflict with the

[1] Rule 23(a) of the Rules of the United States Court of Appeals for the Second Circuit (August 1, 1954) makes no provision for rebuttal argument.

other cases cited by taxpayer in his petition. (Pet. 14.) *United States* v. *Merriam,* 263 U. S. 179, turned on the fact that no services were required as a condition of the bequest. Neither there nor in any other of the cases cited was there an express or tacit agreement for payment made prior to the performance of services.

It is clear by any standard that the payments here represented agreed compensation for professional services and were income.

3. Taxpayer complains of the lapse of time between the receipt of the unreported amounts and the trial. (Pet. 8, 11, 18.) There is, of course, no statute of limitations in tax fraud cases. And taxpayer is scarcely in a position to complain that his concealment prevented the assessment of the tax earlier or that his own actions ultimately led to the discovery of the unreported income. See *Rodiek* v. *United States,* 100 C. Cls. 267; *United States* v. *Rodiek,* 117 F. 2d 588 (C.A. 2d), affirmed, 315 U. S. 783.

Taxpayer also argues that the law was so uncertain in 1924 that he could reasonably believe, and in fact did believe, that the payments received were gifts and not income for tax purposes. The Tax Court did not place credence in his explanations (R. 77-79) and pointed out that taxpayer knew that professional fees were income (R. 77). Implicit in Judge Arundell's opinion was the fact that these payments were as clearly income thirty years ago as they would be today. That fact is established by the written material—decisions, rulings and texts —submitted on brief to the Court of Appeals. See discussion in Black, *A Treatise on Federal Taxes*

(4th ed., 1919), p. 57; Holmes, *Federal Income Tax* (3d ed., 1920), p. 239; Montgomery, *Income Tax Procedure* (8th ed., 1924), pp. 461-462.[2] The finding of fraudulent intent is fully supported and there is no occasion for a second appellate review of the evidence.

CONCLUSION

The decision below is not in conflict with the decision of any other court of appeals; it is in accord with the applicable decisions of this Court; and it presents no question of general applicability in the administration of the federal tax laws.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID O. WALTER,
Special Assistants to the Attorney General.

JULY, 1955.

[2] It may be noted that Judge Arundell had special qualifications for determining the state of the law in 1924. Prior to his appointment to the Board of Tax Appeals in 1925, he was Assistant Solicitor of Internal Revenue in charge of Interpretative, Review and Appeals Divisions. If the Court of Appeals gave some weight to the expertness of the judge as well as the expertness of the court, it was but following the precedent of this Court. See *Helvering* v. *Stuart*, 317 U. S. 154, 163.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 949897 1955

9/21

FILED
AUG 19 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 133

REUBEN D. SILLIMAN, *Petitioner*,

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
I. Discussion	1
II. Conclusion	5
Cases:	
Bogardus v. Commissioner, 302 U.S. 34	3, 4

IN THE

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REPLY BRIEF FOR THE PETITIONER

I. DISCUSSION

This is obviously a case of extreme personal hardship. Accordingly, we feel justified in briefly restating and perhaps clarifying the grounds on which we seek a writ of certiorari in order that there be no misconception with respect thereto, as the result of the respondent's brief.

Our first point was that this case had not been handled by the courts below in a manner that was fair and judicial under all the circumstances. (Pet. 8-12) Respondent appears to answer (Br. 6-7)* that each separate step was not in itself so lacking in fair and judicial procedure and consideration as to require the exercise of the supervisory function of this Court. Plainly, this answer is not adequate. Our petition was not addressed to each step separately nor to judicial procedure in general, but to the confluence of *all* the procedures in *this* case with all the facts.

We pointed out that when a case on its face possesses such extreme opportunities for an injustice being done, the courts should offer more than a casual audience to the defenses raised—and that they must demand the very strictest proof of the allegations of fraud made against the petitioner. When a case is better than 25 years old, when a taxpayer, a member in good standing of this Court for over 52 years, is over eighty years of age, when the amount involved is so enormous, when the point of tax law is so clearly within the area of possible doubt**, and when the issue is as elusive as a man's state of mind in 1924, *it is encumbent upon somebody within this judicial system to see that the taxpayer is afforded the maximum and not the minimum protection of the law.* The proponents of this charge should be held to the very highest standards of proof, and any reasonable doubts should be resolved against them—particularly, with respect to an issue of fraud—an issue which tradition-

---

* "Br." refers to pages of the Respondent's Brief in opposition; "Pet." refers to the Petition, "R." refers to the Record.

** Even today, the issue of gift vs. compensation is one of the most nebulous in the tax law. In 1924, it was, of course, even more so.

ally must be proven "to the hilt" by the Commissioner who has the statutory burden of proof. Instead, a single judge heard the case, decided it and promulgated an opinion to the effect that he (the judge) presumed that the taxpayer must have known that the amounts in question were not gifts on the flimsiest sort of "proof" imaginable.* The Chief Judge of the Tax Court denied the petitioner anything more than this cursory consideration, although it was well within his power and reasonable discretion to refer the matter to the other judges of the court; and, finally, the Second Circuit refused to review the basic issue in this case—the determination of fraud.

The second ground stated in our petition for certiorari was that the decision of the courts below was in conflict with the decision of this Court in *Bogardus* v. *Commissioner*, 302 U.S. 34. (Pet. 12-14) The respondent attempts to distinguish that decision. We submit that the similarities between the two cases, which we set forth (Pet. 13) are far more significant than the distinctions attempted by the respondent.

Our discussion of the *Bogardus* case was keyed to the language and rationale of this Court's opinion

---

*The weakness of the Tax Court's opinion is evident from the paragraph that purports to summarize the evidence supporting the charge of fraud. "Among the elements that establish the existence of fraud in this case are the facts that the petitioner, in the practice of his profession, was accustomed to receiving as income fees for his professional services; for a number of years prior to the taxable years he had filed income tax returns and must have been familiar with the requirement of reporting income derived from whatever source; in the taxable years the petitioner received substantial sums in excess of the three percent provided for by the Winslow Act, which sums were for services rendered and which he knew were not gifts; and that he not only failed to report such excess sums as income but failed to make any disclosure thereof in his returns." (R. 77)

therein, whereas the respondent avoids any references to the opinion but merely selects facts at random that present no valid basis for a distinction between the cases. He also includes one misstatement, namely, that the payments here were made pursuant to an "agreement". (Br. 7) An agreement ordinarily refers to an obligation that can be legally enforced. As the record clearly shows, the payments here were voluntarily made by petitioner's clients and they understood that the payments were voluntary and could not have been compelled to pay the amounts in question. It is obvious, therefore, that the amounts were not paid pursuant to an agreement but were paid, as in the *Bogardus* case, in "gratitude for the past faithful service of the recipient".

Finally, the respondent accuses the petitioner of concealment, which was directly responsible for the lapse of time between the taxable years and the commencement of the action. (Br. 8) As a matter of fact, the direct opposite is true. The record shows that the taxpayer deposited all the amounts received, whether treated as taxable or non-taxable, in bank accounts carried in his own name, and made no attempt to segregate or otherwise disguise the common source of the payments. (R. 68-70) Moreover, these large sums were subsequently invested in securities which were sold in the very years in question and reported on his income tax returns. (R. 99-104) It is interesting to note that for the years 1924, 1926 and 1927, the taxpayer reported an aggregate net income of $197,021.05, and reported purchase of securities of $1,874,383.04. As stated in our petition, "it would have been virtually impossible for a Revenue Agent not to have known that the petitioner had been the recipient of funds in excess of those included in gross income."

(Pet. 6) The Tax Court itself found that the petitioner had maintained complete records of his financial transactions, which included his bank statements and his brokerage statements. (R. 70) It further found that his returns for the years in question were audited by the Bureau of Internal Revenue and in the course of these audits, the Bureau examined these records. (R. 71) In view of the foregoing, it is obvious that the respondent's accusation of concealment is untrue.

Finally, on page 8 of respondent's brief, the two *Rodiek* cases may have been cited with a view to prejudicing this Court against the petitioner since certain charges of fraud were made therein. However, this litigation was decided without any judicial determination as to the fraud charges against the petitioner. Furthermore, the same charges against the petitioner were repeated in the final accounting of the Hackfeld estate before Surrogate Foley of New York and he overruled them in their entirety in a decree which was filed as an exhibit with the Tax Court in this case. That determination became the final judgment disposing of such charges. Judge Foley completely exonerated petitioner from all charges, approved all payments made to him, and allowed him an additional $10,000 for services.

II. CONCLUSION

Respondent's brief in opposition to the petition for a writ of certiorari makes no real attempt to answer the reasons advanced by the petitioner for the granting of the writ. For the reasons stated in the petition, as amplified here, we most earnestly urge that the petition be granted in order that the presently established procedures and practices of the Tax Court may

be reviewed to determine whether the individual taxpayer, faced with accusations such as are presented here, is adequately protected thereby.

Respectfully submitted,

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